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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE,
Plaintiff and Respondent,
v.
MICHAEL JON MOORE,
Defendant and Appellant.

A126448
(Humboldt County
Super. Ct. No. CR084943)

Michael Jon Moore appeals from a judgment entered after he entered a plea of no contest to a charge of transportation of heroin. (Health & Saf. Code, § 11352, subd. (a).) Moore contends the trial court erred in denying his motion to suppress the evidence found on his person. (Pen. Code, § 1585.) We will affirm the judgment.

I. FACTS AND PROCEDURAL HISTORY

An information charged Moore with transportation of heroin (Health & Saf. Code, § 11352, subd. (a)), operating a bicycle in the opposite direction of traffic (Veh. Code, § 21650.1), and operating a bicycle during darkness without proper equipment (Veh. Code, § 21201, subd. (d)). The information also alleged that Moore had served two prior prison terms. (Pen. Code, § 667.5, subd. (b).) Moore initially entered a plea of not guilty.

A. Motion to Suppress Evidence

Moore filed a motion to suppress evidence under Penal Code section 1538.5. At a hearing on the motion, the following evidence was presented.

Eureka Police Officer Patrick Bishop testified that on August 27, 2008, he was on patrol with Officer Baird. At approximately 8:50 p.m., Officer Bishop observed Moore riding a bicycle westbound on an eastbound street. The bicycle had no forward facing light, neither of Moore's hands were on the handle bars, and Moore was talking on a cell phone. Moore was in violation of the Vehicle Code.

Officers Bishop and Baird conducted a traffic stop of Moore, and both officers got out of their patrol vehicle. Officer Bishop had not yet decided whether he was going to cite Moore or give him a warning.

Upon contacting Moore, Officer Bishop observed that Moore was "sweating profusely from the forehead [and] appeared nervous, and his pupils appeared to be dilated." Officer Bishop, who had experience dealing with persons who were under the influence of controlled substances, believed that Moore was showing objective signs of being under the influence of a controlled substance.

Officer Bishop asked Moore if he had "anything on his person," and Moore said "no." Bishop then asked Moore if Bishop could search him. Moore refused. When Bishop asked Moore if he was on parole or probation with search terms, Moore said he was not, and added that he was no longer on parole.

Because he was going to proceed to determine whether Moore was under the influence of a controlled substance, which would require the officer to take Moore's pulse and hold the pupil card next to Moore's eyes, Officer Bishop conducted a patdown search of Moore for officer safety purposes. In Bishop's experience, "people who are under the influence of a controlled substance can pose a higher risk" than those who are not.

During the pat search, Officer Bishop made "a massaging movement" on Moore's right front pants pocket and felt what Bishop believed to be a hypodermic needle. Moore quickly stated he had a knife and made a movement toward his pocket. Bishop

responded by handcuffing Moore. The officer then removed the item from Moore's pocket, which was in fact a hypodermic needle. Moore also had a knife in that pocket.¹

The trial court denied Moore's motion.²

B. No Contest Plea and Sentence

Moore later entered into a plea agreement, by which he pleaded no contest to the count one charge of transportation of heroin (Health & Saf. Code, § 11352, subd. (a)) in exchange for the dismissal of the two other counts and a grant of probation under Proposition 36 for nonviolent drug possession (Pen. Code, §§ 1210, 1210.1, subd. (a)). The court accepted Moore's plea and dismissed counts two and three on the prosecutor's motion.

The court suspended imposition of sentence and placed Moore on probation for three years under Proposition 36.

This appeal followed.

II. DISCUSSION

Moore contends the court erred in denying his motion to suppress evidence. He argues that Officer Bishop did not have sufficient cause to conduct a pat search, and the contraband the officer seized was fruit of the poisonous tree, requiring reversal.

Where, as here, a motion to suppress is not made at the preliminary hearing but after the filing of the information, we review the court's express or implied findings for substantial evidence. We then exercise our independent judgment to determine whether,

¹ At the suppression hearing, the prosecutor did not elicit evidence that Moore also had heroin in his pocket. That evidence was introduced at the preliminary hearing.

² The trial court reasoned: (1) the stop was lawful, because the defendant was riding his bike on the wrong side of the road at night without a light; (2) the initial detention was proper, because it was reasonable to investigate the circumstances further to determine if Moore was under the influence of intoxicating substances; (3) the circumstances during the stop gave rise to a reasonable suspicion that Moore was under the influence; (4) the time of night, the demeanor of the defendant, and the reasonable suspicion that Moore might have been under the influence justified the pat down search; (5) during the pat down search, Moore said he had a knife and the officer felt what he believed to be a hypodermic needle, and therefore the reach into his pocket was lawful.

under those facts, the police acted reasonably under the Fourth Amendment. (*People v. Jenkins* (2000) 22 Cal.4th 900, 969.)

A. Officers' Stop of Moore

A citizen may be temporarily detained by the police if specific and articulable facts caused the officer to suspect that (1) some activity relating to crime has occurred, is occurring, or is about to occur, and (2) the person the officer intends to stop or detain is involved in that activity. (*Terry v. Ohio* (1968) 392 U.S. 1, 30 (*Terry*).)

Here, the officers had a reasonable suspicion that Moore, riding his bicycle in the opposite direction of traffic without a proper light, was in violation of the Vehicle Code. The officers therefore had reasonable cause to stop Moore, and Moore does not present any substantial argument to the contrary.

B. Patdown Search

“ ‘When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others,’ the officer may conduct a patdown search ‘to determine whether the person is in fact carrying a weapon.’ [Citation.] ‘The purpose of this limited search is not to discover evidence of a crime, but to allow the officer to pursue his investigation without fear of violence. . . .’ [Citation.]” (*Minnesota v. Dickerson* (1993) 508 U.S. 366, 373; see *Terry, supra*, 392 U.S. at pp. 24, 27, 30.) The officer must be able to “point to specific and articulable facts which, considered in conjunction with rational inferences to be drawn therefrom, give rise to a reasonable suspicion that the suspect is armed and dangerous.” (*People v. Medina* (2003) 110 Cal.App.4th 171, 176 (*Medina*).)

“The judiciary should not lightly second-guess a police officer’s decision to perform a patdown search for officer safety. The lives and safety of police officers weigh heavily in the balance of competing Fourth Amendment considerations.” (*People v. Dickey* (1994) 21 Cal.App.4th 952, 957.)

In the matter before us, Officer Bishop had a reasonable suspicion that Moore might be armed and dangerous. The detention occurred near 9:00 p.m., about an hour after sunset (according to Moore), when it was dark (according to Officer Bishop).

Moore was sweating profusely from the forehead and appeared nervous, which Bishop believed was an “indication that he possibly ha[d] something on him that he’s not supposed to have.” Moore refused to consent to a search and stated that he was no longer on parole. In addition, Moore’s pupils seemed to be dilated, which led Bishop to suspect that Moore might be under the influence of a controlled substance. Furthermore, as Moore acknowledges, “[s]weating can be due to the physical exertion employed while bicycling or *after taking drugs*.” (Italics added.) Bishop wanted to investigate the possibility that Moore was under the influence, and there is no contention that he lacked a reasonable basis for doing so. This investigation was going to require the officer to be close to Moore at least long enough to take his pulse and hold the pupillometer up to Moore’s face. Indeed, as Moore’s defense counsel confirmed in the trial court and his appellate counsel repeats in the opening brief, “[t]he investigation [for being under the influence] is [to] take the wrist and take the pulse and hold a pupillometer up to his eyes.” In Bishop’s experience, people who are under the influence of a controlled substance can pose a higher risk to officers – a proposition Moore does not dispute. (See *United States v. Foster* (6th Cir. 2004) 376 F.3d 577, 586-587.) Thus, before proceeding to investigate the indications that Moore was under the influence, Officer Bishop wanted to make sure of his safety during the investigation in light of the objective indications that Moore was under the influence and thus posed a potential danger. Under the totality of these specific factual circumstances, it was not unreasonable for Officer Bishop to believe that his safety was in danger.

Moore’s arguments to the contrary are unpersuasive. He argues that Officer Bishop “believed that he could conduct pat down searches of any detained bicyclist who acts nervous and might be possessing some unspecified thing that the rider ought not [to] have. (RT 20) Apparently, even a ‘polite’ bicyclist might be subject to a pat down, depending possibly on whether that two-wheeler is sweating. (RT 21)” The officer’s subjective state of mind, however, is irrelevant. (*Scott v. United States* (1978) 436 U.S. 128, 138.) In any event, Officer Bishop did not testify that he patsearched Moore because he pats down every bicyclist who sweats; rather, he testified that he frisked

Moore because of a combination of his behavior and other matters Bishop observed: Moore appeared nervous, he was sweating profusely from the forehead, and his pupils were dilated, indicating Moore was possibly under the influence of a controlled substance and thus a potential danger to the officer while he continued to investigate whether he was, in fact, under the influence. Moore's reliance on *Medina, supra*, is therefore misplaced. (See *Medina, supra*, 110 Cal.App.4th at pp. 174-178 [officer frisked defendant solely as standard procedure in a "high-gang area late at night," even though there "*wasn't* anything specific" that led him to believe the defendant was armed and "the officer admitted there were *no* such facts"] (italics added).)³

Moore argues that he could have been sweating due "to the physical exertion employed while bicycling." However, riding at night without holding the handlebars, while chatting on a cell phone, does not exactly sound like the Tour de France; nor does the record provide any other suggestion that Moore was sweating profusely from the forehead due to physical exertion. In any event, Moore's point is again irrelevant. "The possibility of an innocent explanation does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct." (*In re Tony C.* (1978) 21 Cal.3d 888, 894.) Furthermore, the fact that Moore was sweating profusely was not the only circumstance on which Officer Bishop relied; he relied as well on Moore's nervous demeanor and dilated pupils.

³ Moore tries to make his point with two of Officer Bishop's statements at the hearing. The first statement reads: "Every person I contact I feel that they could be a possible threat. I don't sit in an office. I go out there and am on the streets patrolling." However, the officer's testimony appearing just a few lines later in the transcript shows he had a more specific purpose in regard to Moore: "Q. But you frisked Mr. Moore? [¶] A. Yes, I did. [¶] A. Why? [¶] A. Because I was going to determine his level or if he was under the influence of a controlled substance." Moore quotes the officer's second statement as follows: ". . . Him acting nervous is an indication that he possibly has something on him that he's not supposed to have. That's why. If you make contact with somebody standing there, they're polite, not acting nervous, I may or may not search them." However, Moore omits the first sentence of the officer's statement, which confirms that the search was conducted based on Moore's specific activity: "His [Moore's] *behavior* determined how and what I was going to do." (Italics added.)

Moore's reliance on our decision in *In re H.H.* (2009) 174 Cal.App.4th 653 is also misplaced. There, at 11:20 p.m. a police officer saw a minor riding a bicycle without proper lighting equipment, in violation of the Vehicle Code. During the ensuing detention, the officer asked the minor to take off his backpack, at which point the minor said he was not on probation and was not consenting to a search. In light of those comments, the officer conducted a patsearch. (*Id.* at pp. 656-657.)

We concluded that the pat search in *In re H.H.* was unconstitutional because it was based solely on the minor's refusal to consent; we said nothing, however, about the issue that is presented here in Moore's case. Rather, we explained in *In re H.H.*: "The question before us is whether the minor's refusal to consent to a search can, *by itself*, form the basis for reasonable suspicion to patsearch. The answer is no." (*In re H.H., supra*, 174 Cal.App.4th at p. 656, italics added.) We also observed: "The minor contends the assertion of his Fourth Amendment rights, *without more*, did not create reasonable suspicion he was armed and dangerous. We agree." (*Id.* at p. 658, italics added.) By no means did we suggest that a police officer cannot have a reasonable suspicion sufficient to conduct a pat search where the detainee not only refused to consent to the search, but also noted he was previously on parole, was sweating profusely from the forehead, acted nervously, and had seemingly dilated pupils which, in the officer's experience, indicated that the detainee might be under the influence of a controlled substance and thus posed a risk of danger to the officer while the officer proceeded to complete his investigation.

Moore fails to demonstrate reversible error.

III. DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P. J.
SIMONS, J.